

## *Introduction to the Transaction Edition*

When this anthology was first published in 1970 under the title *Did You Ever See a Dream Walking?*—its subtitle *American Conservative Thought in the Twentieth Century*—not only was the twentieth century far from over, but the best days of American conservatism, barely then in its adolescence, lay just ahead. Yet such a prospect in 1970 was, indeed, just a dream, walking at best. If anything, the liberalism that had so dominated the century was being eclipsed by the even more radical New Left. Little could the book's twenty-four authors—many of whose essays were written in the early to mid-'60s, several well before that—have imagined that in only a decade a principled conservative would be elected president, that it would be one of the most successful presidencies in the nation's history, and that shortly after its conclusion we would see the collapse of the Soviet communism that had so focused the conservative movement to which those authors made such seminal contributions.

It is no accident, therefore, that when the volume first went to print, conservatives were still defining themselves: with liberalism long infusing the nation's institutions, it was as if conservatism had to be created from whole cloth—not a little ironic for a movement dubbed “conservatism.” Look no further than to the opening words of the book's foreword: Leonard W. Levy and Alfred Young, editors of *The American Heritage Series* of which the book was a part, write that “America celebrates itself as a nation of the liberal tradition,” adding just below that liberalism confidently believes “that it rides the waves of the future.” (Heady thoughts before the fall.) Yet even the book's editor and the man more responsible than any other for the modern conservative movement, William F. Buckley, Jr., can be found, in his wide-ranging introduction, looking over his shoulder, noting ingenious efforts “either to make American

‘conservatism’ go away or to deprive it of substantial meaning.” And indeed, conservatives of that day can be forgiven for feeling embattled. As Edwin Feulner, the current head of America’s largest conservative think tank, has said, in the 1960s you could fit the conservatives in the nation’s capitol in a small phone booth.

Thus, for those too young to know what a phone booth is, who may nonetheless be reading this reissued volume, seeking to discover the intellectual origins of a movement that today, in its political aspects, reflects what pollsters tell us is the dominant American view, it may be useful in this new introduction to consider briefly why it is that so many of these authors, whose ruminations range widely from politics to history, economics, foreign affairs, theology, and more, are so occupied with defining “conservatism.” It is surely no simple urge “to conserve” that animates our authors, writing as they are in the aftermath of the New Deal, and several in the throes of the Great Society. On the contrary, pointing to Europeans unaware of the emerging movement, Buckley writes that “they do not know that there is growing in America a spirit of resistance to the twentieth century.” The entire century? Yes, but hold that thought.

In the meantime, because “conservative” is so vague and elusive an idea, I want in this introduction to focus on that definitional question. Fortunately, Frank S. Meyer’s essay, “The Recrudescing American Conservatism,” speaks directly and perceptively to the issue, especially in its treatment of the diverse strands of conservatism. Accordingly, I will start there. But if modern American conservatism is to be more than a set of ideas, it must operate in the world, even if, in its early years, that activity was far more limited than it is today. In particular, its vision must be institutionalized, and no institution has been more problematic for American conservatives than the Supreme Court of the United States. L. Brent Bozell’s “The Unwritten Constitution” addresses the issue of judicial review, mistakenly I believe, and so I will turn second to that essay and that issue, which must be better addressed if the conservative dream is not simply to walk but to run.

No sooner had Bill Buckley established his biweekly *National Review* in 1955 than it became the locus of the budding American

conservative movement. Not that remnants of older or differing strains of conservative and libertarian thought could not be found or had not arisen before then, but they never converged or coalesced into anything quite like the movement that grew after the magazine's founding. And no editor at the magazine was quite so concerned to harmonize the various strains of that movement than Frank Meyer, famous for his "fusionism."

In his essay here, Meyer begins by clarifying his subject: he is concerned to describe not a cast of mind or a temperament, but conservatism as a political, social, and intellectual movement. History teaches, he notes, that such movements arise after a civilization is "riven by revolutionary transformations of previously accepted norms of polity, society, and thought. Conservatism comes into being at such times as a movement of consciousness and action directed to recovering the tradition of the civilization." But conservatism is not simply a reaction, he continues, much less an effort to restore some lost past. Nor, if it is to be true to itself, can it simply "moderate" the existing situation. Rather, "it is a vindication and renewal of the civilizational tradition as the fundament upon which reason must build to solve the problems of the present." In America, Meyer continues, the contemporary conservative movement's claim to be conservative "is based upon its commitment to the recovery of a tradition, the tradition of Western civilization and the American republic" that has been under a revolutionary attack "since the election of Franklin Roosevelt in 1932." (Note that date, cited no fewer than three times: I will return to it.) The revolutionary transformation that swept the globe in the twentieth century may have been gentler and more humane in America than elsewhere, Meyer concludes, but everywhere "it represents the aggrandizement of the power of the state over the lives of individual persons."

There, precisely, Meyer avers, is the revolutionary transformation that the modern conservative movement has arisen to resist, albeit after a considerable lapse of time, so thoroughly were our institutions penetrated by Liberalism—a label he capitalizes, to distinguish it from classical liberalism. Based on "observation and experience," Meyer then expands on the substance of the

matter, defining conservatism by contrasting it with Liberalism. Whereas conservatism assumes an objective moral order, “with objective standards for human conduct and criteria for the judgment of theories and institutions,” Liberalism is a world of “problems to be solved” through “instrumentalities” like democracy. For conservatives the individual is primary; for Liberals it is the group. Conservatives are “profoundly antiutopian,” rejecting “the entire Liberal *mystique* of ‘planning.’” Accordingly, conservatives believe the state should be limited, in contrast to “the prevailing Liberal tendency to call upon it to act in every area of human life.” As a corollary, conservatives favor a free economic system, not the economic controls so favored by Liberals; and they do so on two grounds—freedom and efficiency. For those several reasons, conservatives champion firm support for the Constitution “as originally conceived—to achieve the protection of individual liberty in an ordered society by limiting the power of government.” That means limiting both federal and state power. By contrast, Liberals endeavor nominally to establish sovereignty in the democratic majority, but “actually in the executive branch of the national government.” Finally, conservatives in Meyer’s day saw “Communism as an armed and messianic threat to the very existence of Western civilization and the United States.” That contrasts, he continues, with “the vague internationalism and the wishful thinking about Communist ‘mellowing’ or the value of the United Nations that characterize Liberal thought and action.” To confirm his summary, Meyer reprints the 1964 Statement of Principles of the American Conservative Union, a statement to which conservatives and libertarians today could easily subscribe.

Why, then, the concern about a certain “tension” in the conservative movement—“between an emphasis on tradition and virtue, on the one hand, and an emphasis on reason and freedom, on the other,” as Meyer puts it? Ever the fusionist, he stresses that “these are not sharply opposed points of view,” just “differences of emphasis, creating tensions within a common consensus.” And he’s largely right in that, I believe, although the differences emerge, not surprisingly, when the debate moves from broad principles, on which all can agree, to more specific applications. Employing

Meyer's terminology, we've seen divisions between traditionalists and libertarians over the so-called War on Drugs, for example, although Buckley himself, along with a good many others in the broader conservative camp, long ago joined the libertarians on that issue. In other areas, too, such as gay rights and foreign affairs, we've seen splits, although in the latter case the divides are often within the two camps.

Interestingly, Meyer briefly plumbs the roots of this tension in what is doubtless the most insightful part of this important essay. "The specifically American form of the Western tradition," he writes, "which is the source and inspiration of contemporary American conservatism, is the consensus established by the Founding Fathers and incorporated in the constitutional settlement." It is true, he continues, that this tension between the traditionalist and libertarian emphases has existed throughout the Western tradition, but it has always been—here his fusionism comes to the fore—"a tension *within* a basic civilizational consensus," and it remained so at the time of the establishment of the Republic.

But many of the characteristics of [the traditionalist-libertarian] opposition, characteristics often threatening the maintenance of consensus, are derived from a very different source, from the naturalization in the United States, during this century and the last part of the nineteenth century [note that dating], of the nineteenth-century conflict between European conservatism and European liberalism. This is historically ironic because that European conflict was the aftermath of the French Revolution, and neither that revolution nor the system which it overthrew had relevance for the American situation. By the same token, the positions of European liberalism and European conservatism of the nineteenth century are also irrelevant here.

Indeed, "the philosophical positions upon which the American constitutional settlement was based," Meyer continues, "had already brought into a common synthesis concepts which were placed in radical opposition by the European conservative-liberal struggle"—respect for both tradition and reason, for the authority of an organic moral order, and for individual freedom as well. That synthesis, Meyer notes, "is neither liberal nor conservative in the nineteenth century sense." Nineteenth-century European conservatives, resisting utilitarianism, positivism, and scientism, were "all too willing to substitute for the authority of the good

the authoritarianism of human rulers.” By contrast, nineteenth-century European liberals grounded their defense of individual freedom, free markets, and limited government in utilitarianism, thus undermining belief in an objective moral order as the foundation of respect for the individual and “the only firm foundation of individual freedom.” Meyer’s discussion, barely summarized here, deserves close attention.

Having integrated and secured the traditionalist-libertarian tension within the constitutional consensus established by America’s Founders, Meyer expresses his belief that the divergent emphases are “gradually being resolved in the life of the American conservative movement.” On balance, I believe that history has born him out. Whatever specific differences have arisen from time to time between the two main strains of the modern movement, there has been agreement that the main problem in modern political life has been, as Meyer puts it, “the aggrandizement of the power of the state over the lives of individual persons.” But he goes on to state clearly that political action alone, however important, will not be enough, for the movement “stands for nothing less than a radical transformation of the consciousness of an age,” which will take an “appeal to the civilizational instincts and beliefs that [those in the movement] feel survive half-smothered in the American people.” And that means meeting “the pretensions of Liberalism area by area and point by point at the level that *conservative* pretensions to be the heirs of Western civilization demand.”

A tall order, to be sure, but to a significant degree it has been carried out over the four decades that have ensued. In fact, to the surprise of many, there was political success at the end of the very year that this volume was originally published when Buckley’s brother James was elected to the Senate from New York on the Conservative Party line. An anomaly, owing to a three-way race and other factors peculiar to that contest, it was nonetheless a harbinger of things to come. The 1970s were stormy, to say the least, with Watergate, the resignation of a president, the collapse of the Vietnam War, the “convergence” and “moral equivalence” theses in Soviet affairs, and stagflation on the economic front,

among much else; but they concluded with elections that gave us Margaret Thatcher in England, Ronald Reagan in America, and the most conservative decade since before the 1930s. And as already noted, soon thereafter Soviet communism collapsed. By the end of the decade, at a political and social if not an institutional level, conservatism had at least come into its own. This happened because, in part, its members had been assiduously at work, creating think tanks, writing books, refining and expanding the conservative and libertarian visions, challenging liberal pieties.

That momentum has continued, but there is still a long way to go, especially when we look at the growing deficits and debts that afflict every Western nation—products of decades of profligate liberalism—and the consciousness that underpins and accounts for those afflictions, the changing of which Meyer rightly took to be the conservative movement’s greatest challenge. I will return to that issue, but I want now to turn to a second essay in this volume, L. Brent Bozell’s “The Unwritten Constitution.”

If Meyer is right, and he is, that the source and inspiration of contemporary American conservatism is the consensus incorporated in our constitutional settlement, reflecting the objective moral order found in the Declaration of Independence and the American Conservative Union’s Statement of Principles, then restoring and securing that order—that is, restoring constitutionally limited government—is the movement’s most important practical challenge, long-range as such a challenge may be. Although constitutional restoration in America falls ultimately to the people, we can accomplish it only institutionally. Short of a revolution, that is, or starting anew through a constitutional convention, the envisioned restoration must be done through our existing institutions, which raises any number of thorny issues. But there is no substitute for starting with a clear conception of the very aim of the undertaking. The Declaration states that simply: “That to secure these Rights, Governments are instituted among Men.” As Meyer puts it, conservatives stand for the Constitution “as originally conceived—to achieve the protection of individual liberty in an ordered society by limiting the power of government.”

Thus, while it is the business of government to protect our liberty, government at the same time must restrain itself in the process, as James Madison famously wrote in *Federalist 51*. Through ratification, “We the People” authorized, instituted, empowered, and limited the government we brought thus into being. We are fortunate that our Framers attended to each of those constitutional functions, especially the last, which they accomplished in several ways: dividing power between the federal and the state governments; separating federal power functionally among the three branches; providing for a bicameral legislature, a unitary executive, an independent judiciary, and periodic elections to fill the offices set forth in the document; and, most important, creating a government of delegated, enumerated, and thus limited powers—the doctrine of enumerated powers. The Bill of Rights was an afterthought, added two years later, for greater protection. And with the addition of the Civil War Amendments, the Constitution was at last “completed” by incorporating the grand principles of the Declaration; due to slavery, that could not have been done at the framing if unity among the states were to be achieved.

Again, however, it takes government, well-crafted government, not simply to protect our liberty but, paradoxically, to protect that liberty from government itself. Toward that end, as the *Federalist* explains throughout, the very point of dividing and separating power is to pit power against power. Surprisingly, perhaps, many in the modern conservative movement have failed to fully appreciate that point, at least as it concerns the courts. Coming of age as they did during the Warren Court era, they saw “judicial activism,” often for liberal ends, as a force to be resisted. Unfortunately, too many failed to distinguish between proper and improper “activism”—decisions grounded in the Constitution, which are not activist at all, and decisions grounded in something else, which are ultra vires. Thus, they urged “judicial restraint,” which meant, as a practical matter, judicial deference to the political branches—the very branches that had given us the modern welfare state against which so many of them otherwise railed. Our remedy against that state, they said, lay in the political branches, not in the Constitution and hence in the courts. It was a counsel of constitutional despair, effec-

tively emptying the Constitution of most of its libertarian content, all to check a perceived “judicial activism,” which in many cases was activism long overdue. And in few places do we see this line of argument more forcefully articulated than in L. Brent Bozell’s essay in this volume.

Unlike Meyer, for whom 1932 was the watershed year, for Bozell it was 1954, when the Supreme Court jettisoned the “separate-but-equal” doctrine, deciding in *Brown v. Board of Education* that segregated public schools were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Credit Bozell for the courage to develop his larger thesis against the most sympathetic case the Warren Court ever decided; he could have chosen a less sympathetic or even a mistaken decision in which his thesis might more appropriately apply, of which there was no shortage from the Warren and, later, the Burger Courts. But the *Brown* decision—clearly right constitutionally, even if poorly reasoned, to put it charitably—was a difficult one to go up against.

Bozell is concerned that the *method* of public policy-making in the United States has undergone a fundamental change since 1954. Although today we tend to think of conservative constitutionalists as “textualists” or “originalists,” for Bozell “we properly speak of the society’s ethical substructure as its ‘constitution.’ It is in the matter of *constitution-making*,” he says, “that the fundamental change in American public life has recently changed.” In so speaking, is Bozell taking us, almost imperceptibly, from the Constitution itself to the people themselves—in a word, from law to politics? Is that a move back in time—from the rule of law to the rule of man? We shall see.

He then distinguishes our written Constitution from our unwritten constitution—and a good part of our “constitution” is in fact unwritten, from rights entailed by such phrases as “due process of law” to rules of interpretation. But a more useful and less misleading distinction, Bozell continues, is between what he calls “our *fixed* constitution and our *fluid* constitution, it being understood that while all ‘fixed’ provisions are written, not all written provisions are fixed.” That distinction turns principally on the method by which the two types of constitution are made and unmade, he says. *Fixed* provisions, reflecting

“a sufficiently broad consensus about the desirability of a given policy to warrant placing that policy beyond the reach of the society’s ordinary political processes,” are made by formal procedures such as Article VI ratification or Article V amendment. Substantively, they tend to be defined “unambiguously.” As examples, Bozell points to the Sixteenth Amendment, imposing an income tax, and the Twenty-second Amendment, which established the two-term rule for the presidency. In the latter case, before Franklin Roosevelt was elected to a third term in 1940, the rule reflected simply a consensus sanctioned by tradition only, thus permitting “a simple, transitory majority temporarily to defy the consensus for want of enforcement machinery.” In effect a fluid provision, the rule was incorporated into our written Constitution as a fixed provision in 1951.

As that example suggests, *fluid* constitutional provisions are “fashioned gradually, subtly, often imperceptibly, by society’s organic process, . . . the product of the society’s inner dynamics of experience, growth and change.” Made and unmade informally, a fluid provision

may have had, at its point of departure, a “principle” set forth in the written Constitution, such as “freedom of speech,” “due process of law,” “equal protection of the law”; but except as the framers made clear their expectations as to how the principle was to be applied, the provision will not become *effective*, until the rivalries, the interplay, the give and take among the society’s diverse forces and factions, have hammered out a working consensus about the concrete particulars of application. (original emphasis)

Regarding not just the Constitution’s rights provisions but its powers provisions too, Bozell sees vast scope for what later he would call “a living law.” Thus, when he discusses the taxing power and the commerce power he makes the same points he did regarding rights. Giving an example that will doubtless shock many of today’s conservatives, he writes that “the gradual emergence of our national government as a ‘welfare state’ illustrates the making of a fluid provision. Our fixed constitution simply does not deal with the subject of federal welfarism.”

To be sure, there is an element of truth in the analysis Bozell has so far presented. The Constitution does in fact leave many things to the discretion of the political branches—the scope of the commerce

power, for example, with due respect for its function of ensuring free interstate commerce; levels of taxation; the conduct of foreign affairs. Likewise, the states, too, have substantial discretion. And the Constitution's broad language is indeed "fluid," admitting of varying interpretations and applications, especially if read in isolation. (In fact, isolated, "clause-bound" interpretation has frequently been a problem in constitutional interpretation.) Insofar, for example, as rules like the "clear and present danger" doctrine arise as exceptions to free speech—another illustration Bozell offers—we are dealing not with "fixed" provisions but with principles that reside beyond the literal text of the Constitution. And with both powers and rights, whether interpreted politically or judicially, the text often allows and even requires interpretive discretion to be guided by custom or other indicia of societal consensus.

But those are simply operations in the normal course of casuistry, which the imprecision of language allows. Just as often the casuistry has little to do with "society's organic processes" or with "hammering out a working consensus about the concrete particulars of application." In fact, when decisions limiting power or protecting rights are "hammered out," usually by the Supreme Court, they very often run *contrary* to any societal consensus. When the Court in 1995 said that Congress had no authority under the Commerce Clause to prohibit guns in schools, for example, or when it protected flag desecration under the First Amendment, or created the Miranda doctrine under the Fourth Amendment, it was hardly in response to any societal consensus that it did so.

But that, of course, is precisely Bozell's point. His central thesis is that until 1954, except for the Civil War and, less calamitously, the Prohibition Era, we enjoyed internal peace because the country's "constitution-makers"—a term he never really defines—by and large observed the distinction between the types of provisions suited for the fixed and for the fluid constitution. But since 1954, the Supreme Court,

with the encouragement of the country's intellectual establishment, has instituted a *third* kind of constitution-making, which is revolutionary both in its methods and its consequences. This new kind of constitution-making, to state the phenomenon broadly, *has sought to transfer the solution of some*

*of the most momentous problems of contemporary public policy from the fluid constitution to the fixed constitution—by judicial decree. The result is that the internal peace of the country has been gravely disturbed, and the country’s potential for peaceful growth in the future seriously jeopardized. (original emphasis)*

And we need to be quite clear about just what and how much Bozell would leave to the “fluid constitution”—removing it, presumably, from judicial oversight.

[S]uch bottom-line and fundamentally ethical decisions as those that determine the kind of economic system the society will sustain, the type of social order it will observe, how it will handle the problem of political orthodoxy and dissent, its approach to religion, the code of personal morality it will sanction—such matters are usually better left to the adjudication of the fluid constitution.

Two questions immediately arise. First, what, if anything, is left for adjudication under the “fixed constitution”? Bozell mentions provisions for allocating public authority, for checks and balances, for qualifications for public office and for voting, for details of government organization, and for those “juridical” rights meant to ensure an even-handed administration of justice—mostly “technical” matters, it seems. Second, what does Bozell mean by “the adjudication of the fluid constitution?” I suggested above that he would remove such matters from judicial oversight. That’s not quite right, but it’s not far off, either.

We come, then, to the heart of the thesis. Early on as his argument unfolds, Bozell offers an example of how the “fluid constitution” works. When the Fifteenth Amendment was ratified in 1870, he notes, “the country as a whole was little more prepared to welcome Negroes to the franchise than the deep South was in 1960.” (For consistency, I shall use “Negro” as Bozell does, since it was the nomenclature of his day.) Thus, its status in the fixed constitution was “extremely shaky” until the Twenty-fourth Amendment, the anti-poll tax amendment, was ratified in 1964. Over that period there was some progress in Negro voting rights, he continues, “but it proceeded apace with changing social attitudes and economic conditions in various parts of the country—which means that the problem, in reality, was being adjudicated over that period of ninety years by our fluid constitution.” Not until “a hard constitutional

consensus about Negro voting” had arisen could the Twenty-fourth Amendment be ratified.

There is much to be said about this example, but I will say only that this is an odd sense of “adjudication”—not the adjudication of a court at a point in time but the slow, very slow, *social* resolution of a matter over nearly a century, during which the *law* (of the Fifteenth Amendment) remained largely ignored and unenforced, with many people suffering accordingly. Nor is the idea made any clearer when Bozell later writes that American constitution-making, until 1954, proceeded “in ‘fluid’ channels,” the “elastic clauses” of the Constitution remaining “flexible instruments of government,” enabling major policy decisions to be

the product of an interaction—a series of organic tensions—between the wills of all branches. Our governors, whether in courts, legislatures or executive mansions, showed a remarkable reluctance to obstruct the flow of the fluid constitution by trying to give fixed constitutional status to policies around which an authentic consensus had not yet formed.

The unmistakable conception of the Supreme Court that emerges here is not that of the nonpolitical, often countermajoritarian branch we normally think of, instituted to decide cases or controversies, frequently by limiting power or upholding rights. No, this is the image of the handmaiden, working cooperatively with the other branches, once a consensus has formed. But how does the nonpolitical Court know that a consensus has formed? That is ordinarily the business of the political branches to determine. And if there is a consensus, why do we need a court? Where is the case or controversy? Legislation will suffice (leaving open the possibility for changes later if the consensus changes).

Yet Bozell is of the view that before 1954, handmaiden was the role the Court mainly played. “From the earliest days of the Republic,” he writes, “the Supreme Court was a major participant in the making of our fluid constitution. Principally through the power of *judicial review*, the Court helped discover and develop working consensuses in areas not covered by the fixed constitution”—which were vast, as we saw above.

That is one reading of our earliest days. Another is that they were replete with famous decisions that *limited* the power that govern-

ments anxiously sought: *Marbury, McCulloch, Gibbons*. To be sure, for quite some time, individual rights were often not well protected. But James Madison, the principal author of the Constitution, clearly foresaw the future role of the courts when he rose on the floor of the House in 1789 to propose that a bill of rights be added to the document: "If [rights] are incorporated into the constitution," he said, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive." An "impenetrable bulwark" is hardly a handmaiden to the political branches.

And "bulwark" is the role the Court played especially well during the so-called *Lochner* era, the forty years that began in 1897 when the Supreme Court, to a large extent, stood athwart the social engineering schemes of the era's Progressives, from whom today's liberals are descended. The era ended in 1937 when the Court caved after Franklin Roosevelt, frustrated over the Court's rejection of his programs, unveiled his infamous Court-packing threat. With that, the Court retreated, Bozell says approvingly, "clearly not because it believed Congress ... to be on superior constitutional ground, but because community sentiment, as reflected in part by ... [the] Court-packing threat, had rallied to the support of the New Deal legislation." Actually, whatever its support for the New Deal legislation, "community sentiment" was not behind the Court-packing threat, which Congress rejected soon enough. But for Bozell, notwithstanding what the Court believed *the Constitution* required, "the Court's capitulation ... *ratified* a revision of the fluid constitutional consensus." Thus, he champions what might be called "popular constitutionalism," coupled with praise for judicial deference to the political branches, which opened the floodgates to the modern welfare state we know and love so well today.

But a funny thing happened as the now supine Supreme Court was eviscerating the very centerpiece of the Constitution, the doctrine of enumerated powers, enabling the redistributive and regulatory state to pour through; was bifurcating the Bill of Rights, reducing economic liberty to a second-class status; and was ignoring the nondelegation doctrine, allowing the bureaucracies

of the modern executive state to emerge and grow exponentially. Importuned by liberals, who over time were unable to win all they wanted in the political branches, the Court under Chief Justice Earl Warren got its second wind. And that's where Bozell's thesis comes back into full bloom.

Citing several areas in which the Warren Court had ruled—wrongly in some cases, I grant, while other cases concerned matters that should indeed have been left to politics—Bozell avers that the matters at issue in those cases “were in the process of adjudication by the country’s varied and intricate organic mechanisms,” but were “suddenly subjected to the rigid imperatives of a judge-defined ‘supreme law.’” In each case, he continues, “we have seen matters about which a hard constitutional consensus does *not* exist treated as though such a consensus *did* exist.” Today, he concludes, “the Court claims not just a participant’s role in the making of the fluid constitution, but the *umpire*’s role. From its old job of being *an* expounder of the constitution [as he understands that history], it has become *the* expounder. *Thus, a Supreme Court decision has become equivalent to a provision of the fixed Constitution.*” (original emphasis and capitalization)

Bozell then illustrates his thesis with “the race problem,” which is instructive, he says, about how this “new” constitution-making method has affected our traditional way of doing business. Working his way to the *Brown* decision, he speaks first of “the narrow aims of the Fourteenth Amendment’s framers”—Negroes “were to have the elemental juridical rights enjoyed by white persons”—narrow because “it was impossible to mobilize a hard constitutional consensus around any further rule for governing race relations.” Set aside the clear intent of the amendment’s framers in the 39<sup>th</sup> Congress, to say nothing of the plain language of the amendment itself, Bozell is anxious mainly to show that this narrow reading did not mean “that relations between the Negro and white races remained frozen where the Civil War amendments left them; it simply means that all further developments took place under the aegis of the fluid constitution.” And because “the expansion of the concept of equal protection occurred through evolution, through our society’s organic processes,” however slow by modern stan-

dards, “the country, instead of fragmenting from the tensions, paradoxically found successive formulas for unity and peace and future progress.” Students of the nearly ninety-year period Bozell references will be forgiven for questioning his contentions about unity and peace.

It is important to understand what Bozell is saying here. It is not that we are only human, that our aspirations, reflected often in our laws, are not always matched by our deeds. On that view, we begin by observing that our fallen condition is well illustrated by our experience under the Civil War Amendments. Starting with the 5-4 decision in the infamous *Slaughterhouse Cases* of 1873, the Supreme Court too often simply ducked the politically hard decisions, especially in race-related cases. Doing that is commendable on rare occasions: the Constitution is not a suicide pact; Lincoln, under the extraordinary circumstances at hand, was justified in suspending habeas corpus. But here, in the course of ordinary events (Did the Civil War continue for another ninety years?), courts should entertain consequentialist considerations only in limited and appropriate cases, failing which their decisions become political, not legal. Yet Bozell is effectively urging the wholesale invocation of such considerations, not really because he disparages the rule of law, but apparently *because he believes there is no law to apply*—or, perhaps better, that the “fluid constitution” that is the “law” is not (yet?) ready to be applied. We are closing in on the issue.

“Then came *Brown v. Board of Education*,” he continues. The country, he notes, was divided on the question of segregated schools: “No hard constitutional consensus had been reached, or was likely to be reached in the foreseeable future.” That meant that “neither side could realistically hope for the adoption of a constitutional amendment” reflecting its view in our *fixed* constitution. Dismissive, it appears, of the idea that we already had such an amendment—the Fourteenth Amendment’s Equal Protection Clause—Bozell laments that, despite the country’s divisions, “the Supreme Court, visibly moved by the ideology of equality, took matters into its own hands and sought to impose upon the country a uniform solution to the problem of mixing the races in the public schools.” (The decision was unanimous.) Still worse, he continues,

in a related case four years later (also decided unanimously), “the Supreme Court, for the first time, entered its own explicit claim to judicial supremacy,” citing *Marbury v. Madison* in the process: “It is emphatically the province and duty of the judicial department to say what the law is.” Never mind that scholars have long cited the 1803 *Marbury* opinion for the proposition that the federal judiciary is indeed supreme in the exposition of the law of the Constitution, or that Alexander Hamilton can be found in *Federalist 78* and after making similar points. For Bozell, apparently, the idea of “co-equal” branches extends even to the power to say what the law is, which would mean that the political branches would often be judges in their own case.

Bozell goes on, however, to make a more general point: after citing the racial unrest that followed for a while after *Brown* was decided (and after having effectively discounted the ninety years of often egregious racial violence that preceded *Brown*), he points to “the central commitment of American political thought, the idea that just government requires the consent of the governed.” That commitment was seriously compromised by the Court’s desegregation decisions, he believes, for in granting fixed constitutional status to those decisions, “without the authority of a hard constitutional consensus,” the Court precluded the restoration of the *status quo ante* except through the supermajoritarian amendment process. True, but absent the Court’s decisions, the *status quo ante* of segregation was privileged. Why should Jim Crow, rather than liberty, be privileged? Are we to assume that segregation reflected “our central commitment to ... the consent of the governed”?

And so we come now truly to the heart of the matter. Bozell’s conception of the Constitution, like that of most conservatives of his era, and many still today, privileges process over substance, and it does because he finds limited content in the document. As we have seen, his idea of a “fluid constitution,” perfectly valid in some domains of our constitutional life, relegates great swaths of our actual lives to the tender mercies of political determination. Perhaps it was put best by another conservative, Judge Robert H. Bork, nominated for the Supreme Court in 1987 by President Rea-

gan, but defeated by brutally unfair Senate confirmation hearings that brought him iconic status, at least, in the conservative movement. The “Madisonian dilemma,” Bork wrote in his 1990 book, *The Tempting of America*, is that “in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities.” Nonetheless, he continued, there are “some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule.” That gets Madison exactly backwards, I submit. Madison stood for the idea that in *wide* areas of life, individuals are entitled to be free because they are born free. Nonetheless, in *some* areas of life majorities are entitled to rule, not by right, but because we have *authorized* them to rule. That gets the order right, as first set forth in Americas’ birth certificate, the Declaration of Independence: liberty first, government second, instituted to secure that liberty.

That vision, set forth majestically by Thomas Jefferson in the Declaration, instituted imperfectly by Madison in the Constitution, but perfected by the Civil War generation some eighty years later, is essentially the vision that Meyer set forth in his essay and the American Conservative Union outlined in its Statement of Principles. Tragically, in their response to the Warren Court and, more particularly, to the civil rights movement of the 1950s and ’60s, many conservatives missed an opportunity to begin restoring that vision by putting the movement on a firm moral and constitutional foundation. To put it in partisan terms, since conservatives tend overwhelmingly to be Republicans and liberals Democrats, both civil rights and constitutionally limited government were Democratic problems, arising in the Democratic South and, before that, during the lawless New Deal. But for too many conservatives, the opportunity to stand for principle was lost due to a fundamental misunderstanding of our political order, which among the essays that follow is reflected most clearly in Bozell’s piece—hence, my focus on it.

None of which is to say that judicial review has not been a problem, the Court’s abortion decisions being Exhibit A. But by overstating and misstating the problem, many conservatives not only misstated their own moral, political, and legal vision but, even more,

disarmed themselves in the battle against the main and much larger problem—the massive growth of government over the twentieth century. Not that the Court alone could role back Leviathan—far from it, just to be clear—but it was one remedy against that evil that was readily at hand, to be used appropriately, as we saw in 1995 when the Rehnquist Court revived enumerated-powers federalism, albeit only at the margins, and we are seeing at this writing as no fewer than twenty-eight states have brought suit against “Obamacare” on the ground that Congress’s commerce power is not boundless.

There has thus been progress since this volume was first published. A good many conservatives, prodded often by libertarians, have come increasingly to see that there is all the difference in the world between “judicial activism” and an active judiciary mindful of its duty to enforce constitutional limits on government, whether or not a “consensus” on the matter before it has yet formed. The law of the Constitution is more than process; it is substance, too. And judges, to perform their duties properly, must understand that substance. But judges, like the voters who elect the presidents and the senators who nominate and confirm them, come from a culture that itself, if limited constitutional government is to be restored, must reflect the principles underpinning such a government. And that is an even more pressing problem today than it was when Meyer flagged it four decades ago. The culture of dependence that characterizes the welfare state is not the culture of a free people.

To address that problem, however, we cannot take 1954 as the year when things changed for the worse, as Bozell does. Conservatives who do—who make their peace, in effect, with the New Deal revolution—have no real ground to complain about the welfare state and the culture it engenders. But neither can we take 1932 and the election that brought the modern welfare state into being as our watershed year, as Meyer does. Rather, it is Buckley—who notes simply in passing the growing spirit of resistance in America to the twentieth century—who puts his finger, by implication, on the origins of our problem. It was the Progressive movement that propelled us into the twentieth century, and it was the Progressives’ ideas that set the tone for all that has followed, against which conservatism, in its essence, should be directing its fire.

In the August 9, 1900, edition of *The Nation*, before it became an instrument of the modern Left, the editors could be found lamenting the demise of classical liberalism. In an editorial entitled “The Eclipse of Liberalism,” they surveyed the European scene, then wrote that in America, too, “recent events show how much ground has been lost. The Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away. The Constitution is said to be ‘outgrown.’” That was 1900, not 1932, not 1954. The Progressives to whom those editors were pointing, sequestered often in elite universities of the East, were animated by ideas from abroad: British utilitarianism, which had supplanted the natural rights theory on which the Constitution rested; German theories about good government, as reflected in Chancellor Otto von Bismarck’s social security experiment; plus our own homegrown theories about democracy and pragmatism. Combined with the emerging social sciences, those forces constituted a heady brew that nourished grand ideas about the role government could play in improving the human condition. No longer viewing government as a necessary evil, as the Founders had, Progressives saw the state as an engine of good, an instrument through which to solve all manner of social and economic problems. In a word, it was to be better living through bigger government.

Those ideas are largely foreign imports, as Meyer discusses. Not only un-American but anti-American, they need to be confronted head-on. But to do that, conservatism must stand, as Meyer said, “for nothing less than a radical transformation of the consciousness of an age” by appealing “to the civilizational instincts and beliefs that ... survive half-smothered in the American people.” A tall order, again, but one that this volume, by bringing before a new audience the origins of the modern American conservative movement, will aid immeasurably.

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